

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1142

To be argued by
FREDERICK T. DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1142

UNITED STATES OF AMERICA,
Appellee,

—v.—

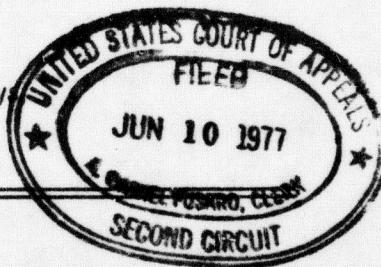
ANTHONY CICCONE
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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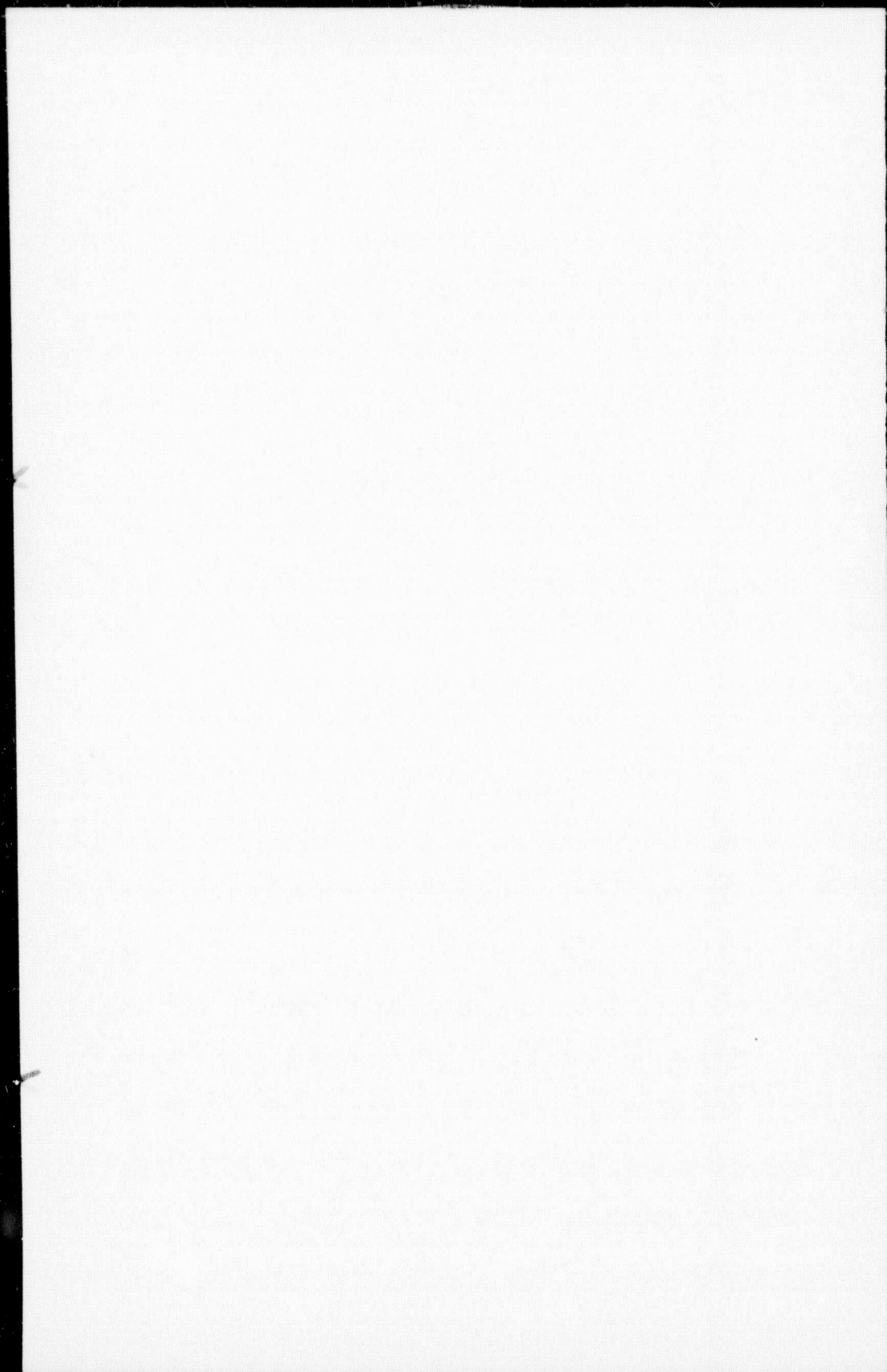


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Docket No. 77-1142

UNITED STATES OF AMERICA,

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—v.—

ANTHONY CICCONE,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Anthony Ciccone appeals from an order committing him for civil contempt pursuant to Title 28, United States Code, Sections 1826(a) and (b), entered on March 2, 1977, in the United States District Court for the Southern District of New York by the Honorable Marvin E. Frankel, United States District Judge.

Facts

On December 13, 1976, Ciccone was scheduled to appear before a Special Grand Jury to give testimony in connection with an investigation into alleged violations of the federal laws prohibiting syndicated gambling and conspiring to do so. Shortly before the appellant's scheduled appearance, his attorney telephoned the Government attorney to seek an adjournment because Ciccone

was having "fainting spells". The Government agreed to the adjournment on condition that Ciccone forward a letter from his doctor by December 31, 1976, to verify that he was unable to appear and testify on the 13th because of "fainting spells". (Appellant's Appendix, [hereinafter "App."], 13A-14A.)

Notwithstanding the Government's request for verification by December 31st, the appellant failed to provide it. Accordingly, in February 24, 1977, six weeks after the December 31st deadline, another grand jury subpoena was served on Ciccone returnable on February 28, 1977, at 3:00 p.m. (App. 14A.)

On February 28, 1977, Ciccone appeared before the Special Grand Jury and refused to testify on the grounds that he was medically unfit and that his testimony would incriminate him. (App. 14A.) Ciccone sought to support the allegation that he was too unwell to testify by offering a letter from his physician, Dr. Impastato, which stated that convulsions could occur during periods of stress. (App. 9A.) In response to that remark in Dr. Impastato's letter, Ciccone was assured in the Grand Jury that "the Government would do everything it could do to accommodate him and make his appearance as least stressful as possible". (App. 20A.) Ciccone was assured that since he would be testifying under an order of immunity, his testimony could not be used against him. Ciccone was further assured that if at any time during the grand jury inquiry he wished to consult with his attorney, Mr. Friedman, he would be given an opportunity. Finally, Ciccone was advised that although his appearance would only last an hour, the Government would nevertheless consent to two half-hour appearances if he felt that a single hour of testimony would be too stressful. (App. 20A). Despite these assurances, Cic-

cone still refused to testify on the grounds of his alleged ill health. Accordingly, the Government adjourned his appearance so that he could be brought before the Part I Judge, the Honorable Marvin E. Frankel, that day and ordered to testify in compliance with the grand jury's subpoena.

Ciccone argued before Judge Frankel that his doctor's letter justified his refusal to testify. (App. 18A.) The Government contended that the letter failed to make a *prima facie* showing that Ciccone was incapable of testifying before the grand jury and that therefore he should be ordered to testify. (App. 19A.) Judge Frankel, while agreeing with the Government that the letter which Ciccone offered was "not overwhelming in its persuasiveness", ruled that Ciccone should be examined the following day by a second doctor to ensure that he was medically fit to testify and that "if I agree with the civilized safeguards Mr. Abzug has proposed, the doctor thinks he is as safe as we can reasonably expect people to be in this life, I will order him on Wednesday morning to go before the grand jury, and no time will have been lost". (App. 21A). Ciccone consented to the second examination. (App. 18A.) He never asked for additional time to procure additional evidence of his alleged inability to testify, and he never requested an evidentiary hearing. At no time did he object in any fashion to the procedure ordered by Judge Frankel.

On March 2, 1977, Ciccone re-appeared before Judge Frankel and a second report of his fitness to testify before the grand jury was submitted to the Court by the Government. This report concluded that with an increase in his medication, Ciccone could testify before the grand jury. (App. 11A.)

After Judge Frankel was advised by the Government that Ciccone did bring his medication to Court (App.

24A.), he found that Ciccone was capable of testifying before the grand jury and ordered him to do so:

. . . I now direct Mr. Ciccone, based upon my appraisal of these medical communications, to take yourself to the Grand Jury right away and appear there as witness.

I did not believe yesterday, on the basis of your own doctor's submissions, that there was any disqualification in your case, any more than there is in regard to any other citizen who has any reason for not going to the grand jury under civilized conditions and submit to the usual process of their questioning.

Having looked at another doctor's view, I am reinforced in that judgment, and I direct you to appear before the Grand Jury. (App. 27A-28A.).

When Ciccone re-appeared before grand jury an hour later, he refused to answer whether he knew an individual by the name of Thomas Mancuso. His appearance was therefore adjourned so that he could be taken before Judge Frankel again and ordered to testify under a grant of immunity issued pursuant to Title 18, United States Code, Section 6002. When Ciccone re-appeared before Judge Frankel, the Government's application to have him ordered to testify under immunity was granted. (App. 30A.) Notwithstanding Ciccone's clear and unequivocal understanding of his obligation to testify under the terms of the immunity order, he told the Court that if he were to re-appear before the grand jury he would persist in his refusal to answer whether he knew an individual named Thomas Mancuso. (App. 30A-31A; 33A-35A.) Ciccone sought to justify his refusal to comply with Judge Frankel's order to testify by reiterating that he was too ill to testify and that questions

about his conversations with others unlawfully intruded upon his First Amendment rights of privacy and freedom of association. Judge Frankel rejected these arguments, cited him for civil contempt and remanded him that day into the custody of the United States Marshal, pursuant to Title 28, United States Code, Section 1826, for the life of the grand jury or until he testified. (App. 31A-35A). Ciccone never argued (as he does now) that the question that he refused to answer pursuant to Judge Frankel's order was not relevant to the grand jury's investigation. Ciccone never requested that Judge Frankel examine the grand jury minutes to ascertain the relevancy of the question to the investigation. His attorney expressly stated that he had "no objection" to the procedure followed by the Court in remanding his client. (App. 35A). At no time did Ciccone request additional time or an evidentiary hearing to support his arguments. (App. 40A). Indeed, Ciccone's attorney remarked to the Court that "I think the [legal] positions are quite clear". (App. 36A).

On May 4, 1977, Ciccone presented the arguments which he raises herein to the Honorable Witman Knapp, United States District Judge, in support of an application for bail pending appeal. Judge Knapp found his appellate arguments frivolous and denied his application. Ciccone appealed that ruling, and on May 31, 1977, a panel of this Court denied his application for bail pending appeal.

ARGUMENT**POINT I****Ciccone Was Given An Ample Opportunity To Present Arguments Or, Had He Requested, Additional Evidence To Support His Claim That He Should Not Be Cited For Civil Contempt.**

Despite his complete failure to request more time to present additional evidence of his alleged inability to testify before the grand jury, Ciccone now claims that Judge Frankel denied him an adequate opportunity to be heard. This claim is astonishing since it is plainly evident from the record of the three hearings held by Judge Frankel that Ciccone was given every opportunity to present arguments and evidence in his own behalf. (App. 16, 31A-33A). It is equally clear that in the District Court Ciccone was satisfied that he had an adequate opportunity to be heard as indicated by his attorney's statement to Judge Frankel that Ciccone had raised all his defenses, that his legal position was "quite clear" to the Court, and that he had "no objection to the procedure that the Government outlined" to hold his client in contempt. (App. 33A, 35A-36A). Since Ciccone not only failed to ask for additional time to present arguments or evidence but actually indicated his *satisfaction* with the clarity of his legal justification for refusing to testify as well as the contempt procedure suggested by the Government and adopted by Judge Frankel, he most assuredly should not be permitted to argue on appeal that Judge Frankel denied him an adequate opportunity to be heard. *United States v. Indiviglio*, 352 F.2d 276, 277 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 967 (1966).

In any event, it is clear that the opportunity to be heard afforded to Ciccone comported with Due Process. Ciccone points out that his allegation of unfitness to testify was "definite and specific," yet he utterly fails to specify either in the District Court or on appeal, how additional time to be heard could have enabled him to perfect his proof or present new arguments. This in itself renders any conceivable procedural defect harmless. *In re Grand Jury Investigation*, 542 F.2d 166, 168 (3d Cir. 1976). Though Judge Frankel was unimpressed with the letter submitted by the appellant's physician on February 28th to support Ciccone's refusal to testify, he instructed the Government to submit an additional medical report on Ciccone's condition out of deference to the fact that "we are dealing with a man's health." (App. 21A). Only after Judge Frankel had carefully reviewed both medical reports and afforded Ciccone an opportunity to be heard as to their contents did he cite Ciccone for civil contempt.* Manifestly, in these circumstances the procedure followed by the Court did not violate Ciccone's Due Process Rights. *In re Sadin*, 509 F.2d 1252, 1255-56 (2d Cir. 1974).

* Doctor Moldaver's report concluded that Ciccone could testify with increased medication. (App. 11A). Ciccone did bring his medication with him on the day he was ordered to testify by Judge Frankel. (App. 24A). Dr. Impastato's report expressed no opinion as to whether increased medication could control Ciccone's tendency towards seizures during periods of stress. (App. 9A). Based on these facts, Judge Frankel's order to testify or be held in civil contempt was not an abuse of his discretion. *United States v. Russo*, 442 F.2d 498, 503 (2d Cir.), *cert. denied*, 404 U.S. 1023, *reh. denied*, 405 U.S. 949 (1971); *United States v. Lee Nan Nam*, 274 F.2d 863, 864 (2d Cir.), *cert. denied*, 363 U.S. 803 (1960).

POINT II

Ciccone Never Asked Judge Frankel To Determine Whether The Testimony That He Refused To Give Before The Grand Jury Was Relevant To Its Investigation; In Any Event, A Satisfactory Showing Was Made Under The Circumstances.

Ciccone also claims that Judge Frankel erred by failing to determine whether Ciccone's refusal to answer whether he knew Thomas Mancuso impeded the grand jury's investigation. Judge Frankel's action, however, was hardly surprising since Ciccone utterly failed to make such a request at any of the three hearings.* In any case, Judge Frankel had before him an affidavit submitted by the Assistant United States Attorney in charge of the investigation that Ciccone's testimony "is necessary and material to the investigation now being conducted by the said Grand Jury with respect to violations of Sections 371 and 1955 of Title 18, United States Code." (App. 7A). Judge Frankel also had a statement from the United States Attorney for the Southern District of New York, Robert B. Fiske, Jr., that, in his judgment, "testimony from (Ciccone) may be necessary to the public interest." (App. 4A). In these circumstances, the

* Ciccone's silence was, in itself, not surprising since he was advised during both his grand jury appearances that Thomas Mancuso was among the targets of the grand jury inquiry into syndicated gambling. Moreover, since Ciccone had been granted immunity pursuant to Title 18, United States Code, Section 6002, the Government was not obliged to prove the relevancy of the question to the Grand Jury's investigation unless Ciccone made some allegation, however fleeting, that the question he was refusing to answer was not germane to the inquiry. *In re Kilgo*, 484 F.2d 1215, 1220-21 (4th Cir. 1973); *In re Vericker*, 446 F.2d 244 (2d Cir. 1971), upon which the appellant relies, is of course inapposite since it construes a repealed statute. *Id.* at 1220-21.

appellant's belated complaint that Judge Frankel failed to examine the grand jury minutes to determine the relevancy of the question Ciccone refused to answer, despite an order granting him testimonial immunity, should not be considered on appeal, indeed, the issue is frivolous on its face. *United States v. Indiviglio, supra*, 352 F.2d at 277.

CONCLUSION

The District Court's Order of Contempt should be affirmed.

Respectfully submitted,

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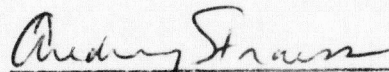
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AUDREY STRAUSS, being duly sworn deposes
and says that ~~s~~ he is employed in the office of the United States
Attorney for the Southern District of New York.

That on the **10th** day of **June, 1977**
~~s~~ he served ~~2 copies~~ of the within brief by placing the same in a
properly postpaid franked envelope addressed:

FRIEDMAN, FRIEDMAN, LEVY & BOTTIGLIERI, P.C.
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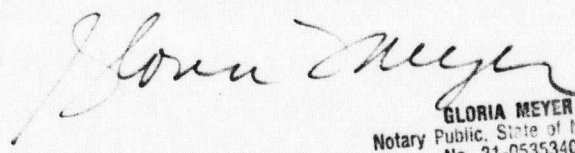
And deponent further says that ~~s~~ he sealed the said envelope and
placed the same in the mail box for mailing at the United States
Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan,
City of New York.



AUDREY STRAUSS

Sworn to before me this

10th day of **June, 1977**


GLORIA MEYER
Notary Public, State of New York
No. 31-0535340
Qualified in New York County
Commission Expires March 30, 1979